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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner,*

v.

GLEN M. CLARKE, et al., *Respondents.*

BRIEF OF BERTHA MAE TABBYTITE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. PELCYGER
YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

VINCENT VITALE
725 Christensen Drive
Anchorage, Alaska 99501

Counsel for Bertha Mae Tabbytite

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STATEMENT

This action was brought by the United States seeking injunctive relief as well as damages for an alleged trespass on lands allotted to an Indian, Bertha Mae Tabbytite, to which the United States holds legal title as trustee. Tabbytite intervened as a plaintiff (Pet.App. E at 11a) and, represented by private counsel, participated in the proceedings below.

Tabbytite joins the United States in requesting that the petition for a writ of certiorari be granted. She adopts the Statement set forth in the government's

petition (at 7-9) and files this Brief for the purpose of setting forth additional reasons in support of the petition that were not presented by the United States. These additional matters include serious constitutional questions raised by the inverse condemnation procedure and a question of statutory interpretation expressly left open in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).

ADDITIONAL REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit Court of Appeals has stated that the inverse condemnation process, by which an entity clothed with the sovereign power of eminent domain "seize[s] [private property] and say[s] 'sue me,' is high-handed government conduct and not to be favored." *United States* v. *Herrero,* 416 F.2d 945, 947 (1969), *cert. denied,* 397 U.S. 973. Recent congressional legislation reflects the same attitude. *See* Pet. at 13 n.12 and 15 n.14.

It is one thing for the Congress to authorize condemnation of twelve million acres of allotted Indian land (*See* Pet. at 9) with all of the protection afforded by federal courts, the judicial process, and representation by the United States;[1] it is quite another to conclude that Congress intended to subject tens of thousands of Indian landowners to "high-handed government conduct."[2] Such a result should not be ascribed to

[1] *See* Minnesota v. United States, 305 U.S. 382 (1939).

[2] "Condemnation" and "inverse condemnation" connote two very different causes of action. One is brought by a governmental entity to acquire title to property; the other is brought by a landowner to recover just compensation. There is no evidence that Congress had the latter idea in mind when Section 357 was enacted in 1901. *See* Pet. at 12.

Congress in the absence of an express directive. *Bryan* v. *Itasca County,* 426 U.S. 373, 392 (1976); *Squire* v. *Capoeman,* 351 U.S. 1, 6-7 and 10 (1956). *See also Menominee Tribe* v. *United States,* 391 U.S. 404, 412 (1968) ("declin[ing] to construe [seemingly unambiguous statute] as a backhanded way of abrogating" Indian property rights). In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 70 n.30 (1978), the Court relied on the government's "overriding duty to deal fairly with Indians" in finding that Congress did not intend to create a cause of action against tribal officials when the Indians had not had a prior opportunity to present their views. Application of that principle in this case leads to the conclusion that Congress did not authorize the seizure of allotted lands and impose on the United States and the Indians the onus of seeking judicial redress.

2. If allowed to stand, the lower courts' reasoning leads to the conclusion that the seizure of property, taken in conjunction with the running of the applicable statute of limitation,[3] would result in the permanent taking of Indian lands without any compensation. *See, e.g., United States* v. *Dickinson,* 331 U.S. 745 (1947). Indian allottees require protection from the United States, *Board of County Commissioners* v. *Seber,* 318 U.S. 705, 715 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310 (1911), and the United States "is faced with an almost staggering problem in attempting to discharge its trust obligations with re-

[3] It is unclear whether state statutes of limitations would be incorporated by virtue of 25 U.S.C. § 357 or if the federal statute, 28 U.S.C. § 2415, would apply. It is important to note that the federal statute applies only to actions for money damages; it does not permit the extinguishment of title by adverse possession and the like. *See* 28 U.S.C. § 2415(c).

spect to thousands upon thousands of scattered Indian allotments," H.R.Rept. No. 2503, 82d Cong., 2d Sess. 23 (1952), quoted in *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968). Therefore, the lower courts' decisions can result in the uncompensated transfer of tens, perhaps hundreds, of thousands of acres of Indian lands to non-Indians. In that event, there would not be any proceeds that could be reinvested in other trust or restricted lands. This conflicts with clear congressional policy. *See Minnesota* v. *United States, supra,* 305 U.S. at 388; Pet. at 15-17. Under these circumstances, "inverse condemnation" is more than "high-handed," it is confiscatory.

3. The power of governmental entities to take private property through seizure poses serious constitutional problems that have never been addressed by this Court. This case provides the opportunity to prescribe constitutional limits on that power.

Seizure of property by the government without providing the owner with either notice or an opportunity to be heard constitutes a blatant denial of procedural due process.[4]

> For more than a century, the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. *Shevin,* 407 U.S. 67, 80 (1972). This Court has twice held that municipalities cannot acquire property by condemnation without first providing actual and personal notice to the affected property owners. *Schroeder* v. *City of New York,* 371 U.S. 208 (1962); *Walker* v. *City of Hutchinson,* 327 U.S. 220 (1946). *See also St. Louis & K. C. Land Co.* v. *Kansas City,* 241 U.S. 419, 427-428 (1916). In the *Schroeder* case the Court specifically held that the physical diversion of a river does not constitute the requisite notice.

> [K]nowledge of a change in the appearance of the river is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for damages resulting from the diversion. That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant . . . .

371 U.S. at 214.[5]

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[4] Since the United States sometimes acquires property through seizure, *see, e.g.,* United States v. Dickinson, *supra;* United States v. Causby, 328 U.S. 256 (1946), it could not be expected to argue that the process is constitutionally infirm. And virtually all of this Court's decisions on the subject of inverse condemnation were the product of suits initiated by landowners seeking just compensation for the taking of their property. Procedural due process issues would not arise in this context. One exception is Schroeder v. City of New York, 371 U.S. 208 (1962), quoted and discussed *infra.*

[5] If the government can seize real property and say "sue me," why can it not replevin personal property, or terminate welfare benefits, or suspend driver's licenses, or garnish wages in the same way? *Compare* Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); and North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975). Under what rationale can property interests that are not protected by the Just Compensation clause of the Fifth Amendment, *see, e.g.,* Fuentes v. Shevin, *supra,* 407 U.S. at 86; Bell v. Burson, *supra,* 402 U.S. at 535-539, be entitled to greater due process protection than vested property rights?

The right to notice and an opportunity to be heard is particularly vital where, as here, the applicable condemnation statute permits the landowner to challenge the authority, necessity, and extent of the taking. Alas. Stat. § 09.55.280.[6] When the taking occurs without notice, those rights are forever lost. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *Winnebago Tribe of Indians,* 542 F.2d 1002 (8th Cir. 1976).

For all of these reasons, the inverse condemnation procedure must be kept within, and restricted to, prescribed limits. At its core, it is a remedy available to a landowner when the government "put[s] on the owner the onus" of initiating legal action to protect his property. *United States* v. *Dickinson, supra,* 331 U.S. at 748. It is most classically applied when the decision not to initiate condemnation proceedings is based upon a good faith belief that Fifth Amendment protected property rights have not been invaded. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *Tempel* v. *United States,* 248 U.S. 121 (1918). It is not and should not be treated as an alternative to condemnation, particularly when there are established judicial procedures that provide for the taking of immediate possession upon the filing of a declaration of taking and the posting of a bond. *See* 40 U.S.C. §§ 258a-258e; 6A Nichols on Eminent Domain § 27.25 [Rev. 3rd ed.

[6] Further protection to affected landowners is provided by Alas. Stat. § 09.55.300 which empowers the court "to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary."

[7] These careful thought-out procedures aimed at protecting the property owner while allowing governments to avoid delay in acquiring necessary property are rendered superfluous if property can be seized at any time without providing any notice whatsoever.

1976]; Alas.Stat. §§ 09.55.380-09.55.460.[7] The decisions below ignore the procedural due process issues inherent in the taking of private property by seizure and encourage the abuse of power by executive officials.[8]

4. *Minnesota* v. *United States, supra,* 305 U.S. at 388-389, holds that Section 357 constitutes a limited waiver of the sovereign immunity of the United States by subjecting the United States to defend federal court suits to condemn allotted lands. Construing the statute as imposing on the government the considerable additional burden and expense of discovering all seizures of allotted lands by persons and entities vested with the power of eminent domain under state law and of initiating and prosecuting innumerable inverse condemnation actions goes well beyond that. That extra step requires reading far more into the statute than appears on its face or by necessary implication. It is contrary to the principle "that a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan,* 424 U.S. 392, 399 (1976), quoting *United States* v. *King,* 395 U.S. 1, 4 (1969).[9]

5. Section 357 must be read in conjunction with statutes governing the acquisition of rights of way or

[8] E. P. Jacobs v. United States, 290 U.S. 13 (1933), holds that the landowner seeking just compensation is entitled to interest from the date of taking as a matter of constitutional law. A contrary result would have encouraged governments to seize and say sue me. United States v. Dickinson, *supra,* can be seen in the same light. By contrast, the decisions below have the opposite effect. *See* Pet. at 15-17 and 19-20.

[9] Congress has been very careful not to waive sovereign immunity in ways that might prove harmful to Indian interests. Thus, for example, Congress has authorized quiet title actions to be brought against the United States but that statute expressly excludes Indian lands in which title is held by the United States. 28 U.S.C. § 2409a.

highways across allotted Indian land. Taken together, these statutes form a comprehensive scheme that precludes acquisition of such rights of way without obtaining the permission of Tabbytite and the Secretary of the Interior. This issue was in *Minnesota* v. *United States, supra,* but was left open. 305 U.S. at 391.

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Department Appropriations Act. 31 Stat. 1058, 1084. Section 4 of that same Act, now codified as 25 U.S.C. § 311, authorizes the Secretary of the Interior "to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways" through tribal and allotted lands. The question presented in this case, as well as in *Minnesota* v. *United States, supra,* is whether Section 357 provides an alternative vehicle for obtaining highway rights of way across allotted land without the Secretary's permission.[10]

In *Minnesota* v. *United States, supra,* Solicitor General Robert H. Jackson argued on behalf of the United States that Section 357, "read in context, merely prescribes the procedure to be followed in a suit for the condemnation of Indian land after authority for the condemnation has been obtained from the Secretary of the Interior," and that Section 4 of the 1901 Act, 25 U.S.C. § 311, "clearly covers all acquisition of Indian land for highways, whether by condemnation or negotiation, and requires the acquiring authority to secure the permission of the Secretary for such acquisition." Brief for the United States in Opposition, *Minnesota* v. *United States,* O.T. 1938, No. 73, at 7; Brief for the United States, *Minnesota* v. *United States,* O.T. 1938, No. 73 at 18-19. A contrary construction, the Solicitor General argued, would make the statute "self-contradictory" and "largely inoperative." Brief for the United States in Opposition, *supra,* at 8. This position is further supported by two canons of construction, that ambiguity must be resolved in the Indians' favor, *Bryan* v. *Itasca County, supra,* 426 U.S. at 392, and that:

> However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

MacEvoy v. *United States,* 322 U.S. 102, 107 (1944), quoting *D. Ginsberg and Son* v. *Popkin,* 285 U.S. 204, 208 (1932). *See also Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974) ("where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priorities of enactment.").[11]

A subsequent statute lends added force to this argument. In 1948, Congress enacted a law providing "for simplification and uniformity in the administration [of grants of rights of way for any purpose over indi-

[10] The sparse legislative history does not shed any light on the relationship between the two provisions. *See* Pet. at 12.

[11] If the rights of way for roads can be acquired by seizure or through condemnation regardless of the desires of the Secretary of the Interior, it is highly improbable that anyone possessing the power of eminent domain under state law would ever seek to obtain the Secretary's permission subject to "compliance with such terms as [the Secretary] may deem necessary."

vidually and tribally owned land]." 62 Stat. 17; S.Rep. No. 823, 80th Cong. 2d Sess. 3 (1948). Section 1 of that Act, 25 U.S.C. § 323, empowered the Secretary of the Interior "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any land now or hereafter held in trust by the United States for individual Indians or Indian tribes. . . ." Payment of just compensation, as determined by the Secretary, is required. 25 U.S.C. § 325. The consent of the Indian owner (tribes as well as allottees) is required except in specifically enumerated circumstances when obtaining consent is impractical, none of which are present in this case. 25 U.S.C. § 324; 25 C.F.R. § 161.3. And Section 4 of the 1948 statute, 25 U.S.C. § 326, provides that "[t]his Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian land be repealed hereby." There is no mention of any laws providing for the condemnation of Indian property or of Section 357.

The protections afforded by the 1948 Act and its comprehensiveness would be nullified if rights of way could be obtained by condemnation or seizure. And the omission of any reference to condemnation or to Section 357 in Section 4 of the 1948 statute indicates that Congress did not intend to preserve the condemnation alternative as a method for obtaining rights of way. Two of this Court's recent Indian decisions hold that Indian statutes enacted in furtherance of now discarded policies (such as Section 357) must be construed in light of intervening laws that implement different policies (such as the ones reflected in the 1948 statute). *Bryan* v. *Itasca County,* 426 U.S. 373, 386-387 and 388

n. 14 (1976); *Moe* v. *Confederated Salish and Kootenai Tribe,* 425 U.S. 463, 477-479 (1976). The *Moe* decision is particularly significant. It holds that an allotment statute, 25 U.S.C. § 349, that is in some respects similar to Section 357, has been effectively repealed by implication as a result of more modern legislation.

Three lower court decisions deal with these questions relating to the interaction of the condemnation and right of way statutes but reach conflicting results. *United States* v. *State of Minnesota,* 113 F.2d 770 (8th Cir. 1940), holds that highway rights of way across allotted land can be acquired either through condemnation pursuant to Section 357 or by a grant from the Secretary under the 1901 highway right of way provision, Section 311.[12] *Nicodemus* v. *Washington Power Co.,* 264 F.2d 614, 618 (9th Cir. 1959), holds that Section 357 and the 1948 statute, Section 323, offer two alternative methods for acquiring rights of way across allotted Indian land. *Plains Electric Generation and Transmission Cooperative* v. *Pueblo of Laguna,* 542 F.2d 1375, 1379-1381 (10th Cir. 1976), holds that a 1926 statute authorizing the condemnation of land held by the Pueblo Indians of Mexico was impliedly repealed by the 1948 statute as applied to the acquisition of rights of way. The lower court decisions in this case do not address this issue.

The question left open in *Minnesota* v. *United States, supra,* 305 U.S. at 391, "whether, as a matter of sub-

[12] This result was reached by ignoring the applicable canons of construction (*see supra* at 9) and by relying on an alleged administrative construction that is directly contradicted by contemporaneous material cited by the Solicitor General. *See* Supplemental Memoranda for the United States, Minnesota v. United States, O.T. 1938, No. 73.

stantive law, the lack of assent by the Secretary of the Interior precluded maintenance of the condemnation proceedings'' is presented in this case [13] and warrants this Court's consideration.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. PELCYGER
YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

VINCENT VITALE
725 Christensen Drive
Anchorage, Alaska 99501

Counsel for Bertha Mae Tabbytite

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[13] If a highway right of way through Tabbytite's allotment cannot be acquired without the consent of the Secretary of the Interior and Tabbytite, an easement for that purpose certainly could not have been acquired by seizure and therefore ejectment and trespass damages were the appropriate remedies.